



## **Case Summary**

Ronald Michael appeals the thirty-four year sentence imposed following his convictions for one count each of Class A felony child molesting and Class C felony child molesting. We affirm.

### **Issue**

The sole restated issue is whether Michael was properly sentenced.

### **Facts**

In 2004, Michael lived with his son and daughter-in-law, Kenneth and Vonda Michael, and his granddaughter, A.M., who was ten years old. On February 26, 2004, Kenneth awoke at 10:00 p.m. to turn off a light and noticed that A.M. was not in her bed. He found A.M. in Michael's bed. She was fidgeting and had the covers pulled up to her neck. Kenneth told A.M. to return to her bedroom, but she hesitated. Kenneth then pulled the covers back, revealing that A.M. was shirtless and was attempting to pull up her shorts and underwear.

A.M. told Vonda that she had gone to Michael's bed because she was scared, and that Michael had then rubbed her chest and "private area" or vagina and had "squeezed" her vagina. Tr. p. 16. When Kenneth confronted Michael, he said, "I've messed up. I'm sorry." Id. at 15. A.M. also stated in a later deposition that Michael had "done this to her a lot" and on at least one prior occasion had pressed his finger into her vagina. Id. at 16.

On March 12, 2004, the State charged Michael with one count of Class C felony child molesting. On April 20, 2004, the State filed an additional charge of Class A felony child molesting. On May 31, 2005, on the morning a jury trial was set to begin, Michael

pled guilty without the benefit of a plea bargain. The trial court sentenced Michael to terms of thirty and four years for the Class A and Class C felony convictions, respectively, and ordered them to run consecutively for an aggregate term of thirty-four years. Michael now appeals his sentence.

### **Analysis**

At the outset, we observe that Michael's case straddles changes in Indiana's sentencing laws. Michael was charged with these crimes in March and April 2004; he was convicted in May 2005 and sentenced in July 2005. In the meantime, effective April 25, 2005, our legislature amended the sentencing statutes to replace "presumptive" sentences with "advisory" sentences. Both Michael and the State seem to assume that the previous "presumptive" system applies in this scenario, and we will analyze this case accordingly. See also Weaver v. State, 845 N.E.2d 1066, 1070-72 (Ind. Ct. App. 2006), (holding that previous system applied to defendant convicted before amendment but sentenced after amendment), trans. denied; but see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (holding the opposite), trans. not sought.

We also note that the change in the sentencing statutes was prompted by the decisions in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Smylie v. State, 823 N.E.2d 679 (Ind. 2005), which, under the presumptive sentencing scheme, required juries to find the existence of non-criminal history aggravators used to enhance a sentence above the presumptive term. Although Michael mentions neither Blakely nor Smylie by name, he does contend that it was improper for the trial court to rely upon his being in a position of trust as an aggravating circumstance because that

“fact” was not found by a jury or admitted by him, citing Altes v. State, 822 N.E.2d 1116, 1125 (Ind. Ct. App. 2005), trans. denied (citing Blakely). Because Michael received presumptive sentences for each conviction, however, Blakely is not implicated by the trial court’s use of the position of trust aggravator, even if it was used to offset mitigating circumstances. See Davidson v. State, 849 N.E.2d 591, 594 (Ind. 2006). Additionally, Blakely is not implicated by the imposition of consecutive sentences. See Smylie, 823 N.E.2d at 686.

Ordinarily, a trial court did not have to set forth its reasons for imposing a presumptive sentence. Frey v. State, 841 N.E.2d 231, 234 (Ind. Ct. App. 2006). We have held, however, that if the trial court in fact found aggravators and mitigators but still imposed the presumptive sentence, then, pursuant to Indiana Code Section 35-38-1-3, the trial court had to provide a statement of its reasons for imposing the presumptive sentence. Id. Additionally, a trial court’s decision to impose consecutive sentences, when not required to do so by statute, must be accompanied by an adequate explanation for selecting the sentence imposed. Edmonds v. State, 840 N.E.2d 456, 461 (Ind. Ct. App. 2006), trans. denied.

When faced with a non-Blakely challenge to a sentence under the prior presumptive sentencing scheme, if the court found aggravators and mitigators, we must first determine whether the trial court issued a sentencing statement that (1) identified all significant mitigating and aggravating circumstances; (2) stated the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulated the court’s evaluation and balancing of the circumstances. Hope v. State, 834 N.E.2d 713,

717-18 (Ind. Ct. App. 2005). If we find an irregularity in a trial court's sentencing decision, we may remand to the trial court for a clarification or new sentencing determination, affirm the sentence if the error is harmless, or reweigh the proper aggravating and mitigating circumstances independently at the appellate level. Id. at 718. Even if there is no irregularity and the trial court followed the proper procedures in imposing sentence, we still may exercise our authority under Indiana Appellate Rule 7(B) to revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender. Id.

Here, the trial court made a sentencing statement in which it acknowledged Michael's guilty plea as a mitigator, but said "it isn't worth much" because Michael did not plead guilty until the morning of trial after potential jurors had already been brought in. Tr. p. 37. The trial court also stated, "what's really significant is the gentleman has no criminal history. We don't see that very often." Id. As an aggravator, the court observed, "he admitted he molested his granddaughter and that's a position of trust. I mean that's just simply outrageous. It's not right." Id. In conclusion, the court stated that if found "the aggravating circumstances outweigh the mitigating circumstances." Id. at 39-40.

We find no error in the trial court's sentencing statement. We cannot discern that the trial court overlooked any significant mitigating circumstances. It properly gave recognition to two well-settled mitigating circumstances, Michael's guilty plea and lack

of criminal history.<sup>1</sup> It also explained the mitigating weight it believed each factor warranted, as well as the aggravating weight given to Michael's position of trust over A.M.<sup>2</sup> Finally, the court's thought process in evaluating and balancing the mitigating and aggravating circumstances is clear and detailed. The trial court followed the proper procedures in sentencing Michael.

We now independently evaluate whether Michael's aggregate thirty-four year sentence is inappropriate in light of his character and the nature of these offenses. It goes without saying that Michael's complete lack of a prior criminal history at age sixty-four is a positive factor reflecting on his overall character. See Cloum v. State, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002). Additionally, Michael's decision to plead guilty weighs in his favor, especially in light of the fact that no charges were dismissed in exchange for the plea. That he pled guilty on the morning of trial does not deprive the plea of all mitigating weight. See Cotto v. State, 829 N.E.2d 520, 525-26 (Ind. 2005) (holding defendant's morning-of-trial guilty plea was still entitled to "some weight"). Nevertheless, the timing of a guilty plea is a relevant consideration in determining its

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<sup>1</sup> Michael contends that he also expressed remorse and was a productive member of society up until these events. We believe these proposed mitigators are, in this case, inherent in the mitigating weight given to his guilty plea and lack of criminal history, respectively.

<sup>2</sup> Michael contends the trial court also found as an aggravator that the molestations caused emotional trauma to A.M. and the family but failed to explain why such trauma was worse than in a "typical" molestation case. "The impact upon others may qualify as an aggravator in some situations, but the defendant's actions must have had an impact of a destructive nature that is not normally associated with the commission of the offense in question and this impact must be foreseeable to the defendant." Leffingwell v. State, 793 N.E.2d 307, 309-10 (Ind. Ct. App. 2003). It appears to us, however, that the trial court's discussion in this regard was not meant to state the existence of an additional aggravator, but merely to explain the significant weight it was giving to the fact that Michael violated a position of trust as A.M.'s grandfather.

mitigating weight. See Francis v. State, 817 N.E.2d 235, 238 (Ind. 2004) (holding guilty plea was entitled to high mitigating weight in part because it was made “at an early stage of the proceedings”). Although A.M. was spared the trauma of testifying before a jury regarding Michael’s crimes, his plea came after the case had been pending for over a year and, in the meantime, A.M. was deposed in preparation for trial. Also, the State was not spared the expense of preparing for trial and summoning a jury.

On the minus side, with respect to Michael’s character and the nature of these offenses, we agree with the trial court that it is particularly egregious for a grandfather to take advantage of his grandchild as Michael did. That Michael violated a position of trust as a grandfather when he molested A.M. is self-evident. See Trusely v. State, 829 N.E.2d 923, 927 (Ind. 2005) (defendant’s admission that she was child’s daycare provider clearly established existence of a position of trust). Additionally, the factual basis for Michael’s guilty plea provided by the State, which Michael did not challenge, indicated that the incident of February 26, 2004, when Kenneth found Michael in bed with A.M., was not an isolated incident. At the very least, he had on at least one prior occasion digitally penetrated A.M.’s vagina. The entire scope of Michael’s improper conduct with A.M. is unclear, but at a minimum, there is evidence in this case of two separate acts of molestation occurring over a period of time. Evidence of repeated molestations occurring over a period of time may be a proper basis for enhancing a sentence. Newsome v. State, 797 N.E.2d 293, 300 (Ind. Ct. App. 2003), trans. denied.

In considering the positive attributes of Michael’s guilty plea and lack of criminal history balanced against the negative attributes of the grave violation of a position of trust

and evidence of more than one molestation occurring over a period of time, we conclude that Michael's thirty-four year aggregate sentence is appropriate. Michael's lack of criminal history is an especially weighty mitigator, but we also believe his violation of a position of trust is sufficient to counterbalance it. Michael took advantage of not only A.M.'s trust, but also Kenneth and Vonda's trust in this situation. Imposition of presumptive terms for these offenses is appropriate. As for the consecutive sentencing order, we conclude that the evidence of multiple molestations occurring over a period of time is sufficient to outweigh the mitigating effect of Michael's last-minute guilty plea so as to justify that order.

### **Conclusion**

The trial court followed the proper procedures in imposing Michael's sentence, and we cannot conclude that his aggregate thirty-four year sentence is inappropriate. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.